

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLYDE BATES and MANUEL JOE CHAVEZ,
Petitioners and Appellants

vs.

LAWRENCE E. WILSON, Warden,
San Quentin Prison,

Respondent and Appellee.

No. 21366

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

JURISDICTION

This is an appeal from an order denying a petition for a writ of habeas corpus sought by two state prisoners. The jurisdiction of this Court is conferred by Title 28 United States Code section 2253 which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Prior Proceedings in State and Federal Courts.

Appellants were jointly tried in the Los Angeles Superior Court on six counts of murder in

violation of California Penal Code section 189, and one count of arson in violation of section 448a. They were tried along with Manuel Hernandez. Each was convicted on all counts. Appellants were sentenced to death, while Hernandez received life imprisonment. Appellants' convictions were affirmed by the California Supreme Court. People v. Chavez, 50 Cal.2d 778, 329 P.2d 907 (1958), cert. denied, Chavez v. California, 358 U.S. 946, 79 S. Ct. 356 (1959), and Bates v. California, 359 U.S. 993, 79 S. Ct. 1126 (1959).

Bates filed a petition for a writ of habeas corpus in the California Supreme Court on January 3, 1958, which was denied on January 23, 1958. In re Bates, Crim. No. 6196 (Calif. Sup. Ct., Jan. 23, 1958).

On August 4, 1959, Chavez filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division (No. 38423). He was joined by Bates who filed a similar petition on August 6 (No. 38427). Both petitions were denied on August 7, 1959.

Appeals were filed in the United States Court of Appeals for the Ninth Circuit (Nos. 16590, 16622) and on June 16, 1960, the cases were remanded for hearing on specified issues. Chavez v. Dickson, 280 F.2d 727

(1960), cert denied, 364 U.S. 934, 81 S. Ct. 379
(1961), rehearing denied, 366 U.S. 922, 81 S. Ct.
1092 (1961). On this appeal, the order of the district
judge in denying the writ was upheld as to most of
the issues:

(1) The construction placed upon sections
448a and 189 of the California Penal Code by the
California Supreme Court in People v. Chavez, 50 Cal.
2d 778, 329 P.2d 907 (1958), was not arbitrary or
unreasonable, nor did it amount to an ex post facto
law;

(2) The failure to object at trial to
assertedly prejudicial remarks of trial judge and
prosecutor barred collateral attack;

(3) A remark of the prosecutor to which
objection had been made did not result in a denial of
due process;

(4) Since the statements made by Hernandez
and Oscar Brenhaug were not admitted against Chavez,
and because the trial court so instructed the jury,
no federal question was presented as to him;

(5) Since the Hernandez statements were
also not admitted against Bates, with a similar caution-
ary instruction to the jury, no federal question was
presented in regard to that issue;

(6) The admissibility of the Brenhaug statement against Bates was an issue of state law and did not present a cognizable federal question; and

(7) The prejudicial effect of photographs taken at the scene of the fire was not subject to habeas corpus review in light of prior state determination of admissibility.

The cases were remanded for an evidentiary hearing, however, on two issues:

(1) Whether or not the transcriptions of the Hernandez and Brenhaug statements were so grossly inaccurate as to deprive appellants of a fundamentally fair trial; and

(2) Whether or not the admission into evidence of photographs of the victims taken after the victims had been removed from the scene of the crime were so prejudicial as to deprive appellants of due process.

On remand, hearings in the United States District Court were held, and the petitions were again denied on July 11, 1961. Appeals were filed in the United States Court of Appeals for the Ninth Circuit. The decision of the District Court, denying the

petitions, was affirmed. Chavez v. Dickson, 300 F.2d 683, cert. denied, 371 U.S. 880, 83 S. Ct. 151, rehearing denied, 371 U.S. 931, 83 S. Ct. 295 (1962). It was held therein that the transcripts of the Hernandez and Brenhaug statements were substantially accurate and any inaccuracies were not prejudicial. It was also concluded that the admission of allegedly "gruesome" photographs was not a deprivation of due process.

On January 30, 1963, Bates filed a petition for a writ of habeas corpus in the California Supreme Court which was denied on February 6, 1963. In re Bates, Crim. No. 7318 (Calif. Sup. Ct., Feb. 6, 1963).

On March 1, 1963, Chavez filed a petition for a writ of habeas corpus in the California Supreme Court which was denied on March 13, 1963. In re Chavez, Crim. No. 7338 (Calif. Sup. Ct., March 13, 1963).

B. Present Proceedings.

Preliminary Pleadings.

On February 26, 1963, Bates filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Southern

Division (No. 41325; CT 1-33).^{*} He was joined by Chavez in an identical petition filed on the same day (No. 41326; CT 36-68).

On February 26, 1963, both appellants filed petitions for a stay of execution; their executions having been scheduled for the following day (CT 76-83). Orders staying execution were entered immediately (CT 84-85).

On March 11, 1963, Bates filed a supplemental petition for a writ of habeas corpus (CT 86-101), which contained five additional affidavits (CT 95-100). On the same date, Chavez filed an amended petition (CT 102-16).

On March 19, 1963, the respondent filed his return (CT 118-35). A traverse to that return was filed on March 25, 1963, on behalf of Chavez (CT 136-41). Bates also filed a traverse on March 25, 1963 (CT 142-48), together with ten additional affidavits (CT 146-47, and on unnumbered pages appearing between CT 147-48).

^{*}The following abbreviations will be used to designate pages of the various transcripts:

- (1) "TT" -- Reporter's Transcript of the 1957 Trial
- (2) "CTT" -- Clerk's Transcript of the 1957 Trial
- (3) "HCT" -- Reporter's Transcript of the 1964
Habeas Corpus Hearings
- (4) "CT" -- Clerk's Transcript of the present case

The First Order: February 24, 1964.

On February 24, 1964, an order was issued that distinguished between those issues which could be determined without an evidentiary hearing and those issues which could not (CT 293-311). Bates v. Dickson, 226 F.Supp. 983 (N.D. Cal. 1964).

The issues disposed of by a thorough review of the state court record without an evidentiary hearing were as follows:

(1) In his original petition, Bates had claimed that he had been convicted of "murder by torture," a crime not charged, but this contention was denied as not raising a federal question (CT 298-99). This issue has not been pursued on appeal.

(2) Bates' claim that trial counsel was incompetent by not presenting evidence of Bates' hypersensitivity to alcohol was denied after a review of the trial court record (CT 301-02).

(3) Bates' claim that he was forced to be a witness against himself when he was interrogated about his prior felony convictions, and that the convictions were not properly authenticated, was denied (CT 302-03).

(4) This order also denied a claim of Chavez that he was deprived of due process because a juror made

a post-conviction statement that Chavez could not be believed because he was a member of a "rat-pack" gang, and that trial counsel was not adequate because he did not pursue the issue (CT 303-04). This point has not been urged on appeal.

A number of issues were to be determined after an evidentiary hearing.

(1) The first was whether or not illegally seized evidence had been used against both appellants (CT 304). Bates claimed that after he was arrested, the police returned to his home and seized his automobile, after which it was driven to the police station and searched without a warrant (CT 305). In addition to joining in Bates' claim, Chavez asserted that the jacket used as evidence against him was discovered in the course of an illegal search of his home (CT 305). A hearing on these issues was deemed necessary in light of the decisions in Mapp v. Ohio, 367 U.S. 643 (1961), and California v. Hurst, 325 F.2d 891 (9th Cir. 1963) (giving Mapp retroactive application) (CT 309-10).

(2) Another issue involved the so-called "accusatory statements" (CT 304). Both Bates and Chavez alleged that statements were used against them at trial which were taken during a period of police custody and

before any of the declarants had been advised of their constitutional rights (CT 306). The hearings were deemed essential to determine the voluntariness of those statements (CT 310).

(3) The last issue was that of inadequate assistance of counsel. This claim was grounded upon the failure to appellants' trial counsel to object to either the evidence allegedly illegally seized or the allegedly involuntary statements (CT 304, 308).

The 1964 Hearings.

Hearings were held on May 11-15, 18-19, and 22, 1964 (see Reporter's Transcript). The matter was ordered submitted on June 17, 1964 (CT 391).

Respondent's Linkletter Motion.

On July 8, 1965, respondent filed a motion seeking dismissal of the proceedings (CT 314-15). The motion was based upon Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965), which refused retroactive application of Mapp, and upon the points and authorities previously cited by respondent (CT 317-18). On July 9, 1965, it was ordered that the submission of the matter be set aside, giving both parties further time within which to submit briefs deemed necessary due to respondent's motion (CT 321-22).

The Final Order.

On June 29, 1966, the petitions were denied (CT 367-72). A certificate of probable cause was issued on July 1, 1966 (CT 374). Notice of appeal was filed on July 26, 1966 (CT 375).

C. Executive Clemency.

On December 22, 1966, the Governor of the State of California granted to both appellants a limited commutation of sentence. Bates' sentence was commuted to life imprisonment without possibility of parole [see Appendix, Exhibit A]. Chavez' sentence was commuted to life imprisonment [see Appendix, Exhibit B].

D. Statement of Facts: 1957 Trial.

On April 4, 1957, Oscar Brenhaug and appellant Bates had some drinks at a bar. After leaving it, they met appellant Chavez and Manuel Hernandez and all four drove to the Corner Bar in Chavez' car. Subsequently they drove to the Mecca Bar, arriving at about 9:30 p.m. and taking a booth. The waitress was unable to obtain an I.D. card from Hernandez, so the bartender asked for identification from him and from Chavez. When Hernandez stated he had none, and Chavez refused to show any, the bartender refused to serve them. (TT 101, 140-45, 364-74, 384, 885, 894-98, 951).

The four men approached the bar. Chavez and Bates asked some girls to dance; Chavez dancing with Herminia Morales, a patron, and Bates with the waitress, Joyce Chapdelaine. Bates, Chavez and Hernandez subsequently asked to dance with Miss Morales, but were all refused. Chavez kept putting his arm around her and all three men began to talk abusively. The bartender, noticing that the girls were being annoyed, told the men to be quiet or leave. An argument began and the bartender asked a customer to aid him in ejecting the foursome. Bates, Chavez and Hernandez were shoved outside, whereupon Bates and Chavez fought with the bartender and the assisting

customer. When the fight ended, either or both Bates and Chavez declared that they would come back to get even. Soon thereafter one or both of the appellants re-entered the bar to get Brenhaug who, being in a drunken stupor, had remained inside during the fracas. (TT 18-28, 50, 88-89, 145-59, 165-69, 248-60, 329-32, 336, 361, 379-89, 500, 552-55, 560-61, 599, 902-04, 955-56.)

After being thrown out of the Mecca Bar, the four men got into Chavez' car and drove away. Either Bates or Chavez declared that they were "going back and get even with them." On the way, Bates got out of the car and obtained a five-gallon bucket. Thereafter the four changed cars, all getting into Bates' light-blue Plymouth sedan. Bates, who was driving, stopped the car and he and Hernandez walked to a gas station where they had the bucket filled with gasoline. They then drove back to the Mecca Bar and double-parked in front. Bates, Chavez, and Brenhaug climbed out. Brenhaug, who said "I don't want to get in no trouble," was shoved back inside and Bates ordered him to stay there. Hernandez sat behind the wheel and kept the engine running. Bates carried the bucket to the open door of the bar, and as he sloshed the gasoline inside, shouted "I will get everyone of you in there." Chavez threw in a lighted book of

matches and the bar exploded into flames. Six customers were killed in the inferno, while two others were badly burned. Bates and Chavez leaped into the waiting car and it sped away. Hernandez drove to the Corner Bar and all except Brenhaug went inside. Brenhaug fell asleep in the car. At 2:00 a.m., after the bar closed, they drove towards Bates' house, letting Chavez and Hernandez out along the way. Bates parked in his driveway and both he and Brenhaug went to sleep. (TT 169-84, 280-94, 307-12, 389-403, 439-44, 519-22, 567-74, 593-97, 652-78, 713-25, 787-92, 861-62, 867, 904-24, 966-67, 981-99, 1004-06, 1129-31, 1227-54, 2402.)

At about 3:00 a.m. on the morning of April 5, 1957, Officers Clyde Call and Richard Irwin of the Los Angeles Police Department went to the Bates residence. Pursuant to directions given and information received through official channels, they had gone to the home of Lyle and Robert Jacobsen in search of information about one of the participants in the crime who was known as "Oscar." The Jacobsens led the officers to the Bates house where they found a man identified as "Oscar" asleep in a car. When the car door was opened, a strong smell of gasoline came from inside. The floor mat was stained and the car tailpipe was also warm. The occupants,

Brenhaug and Bates, were arrested. (TT 1278-89, 1327, 1340.)

At 5:00 a.m. a chemist examined the auto which had been taken to the police garage. Both wine and gasoline were detected inside the car, and a small piece of floor mat was removed. The matting was not subjected to chemical tests. Instead, the chemist preserved it in a jar and the jury was permitted to examine for themselves the validity of the chemist's olifactory analysis. (TT 1173-80.)

In the afternoon of April 5, 1957, Officers Everett Cummins and Robert Sluder went to Chavez' home. Mrs. Chavez showed them the jacket her husband had worn the night before. When Chavez arrived home from work, he was arrested. Though the officers had not told him why they were there, he said, "I have been expecting you all day." Before leaving Chavez gave his wife some money and directed her to obtain a lawyer. The officers asked him to bring his jacket with him. (TT 1262-72.)

The next day Hernandez was arrested. He too was not told the reason for his arrest, but himself stated that he was being arrested for the Mecca Bar fire. In a conversation which occurred at the police station on April 7, Hernandez related the events in detail, noting that

Brenhaug did not want to take any part in the crime and suggesting that he had been reluctant himself. (TT 1357-90, 1433-49.)

On April 9, 1957, the four accused were brought together for an interview and were asked to tell what had happened on the night of April 5. Brenhaug spoke first, and related the events in detail. Hernandez agreed that Brenhaug's version was, for the most part, correct. Chavez said that Brenhaug and Hernandez were lying, and that he had had nothing to do with the fire. Bates claimed that he could remember only fragments. (TT 1463-1512.)

Hernandez did not take the stand and his witnesses did not suggest any sort of defense (TT 1537-62). Chavez' defense was that after the fight at the Mecca Bar, he had gone home (TT 1565-1842). Bates' defense was that he had drunk so much alcohol, starting early in the day, that he could remember only fragments (TT 1843-2051).

In rebuttal, one witness testified that Bates was not drunk as of the afternoon of April 4 (TT 2065-76). A police chemist also testified that had anyone consumed as much liquor as Bates claimed he had, he would have been comatose and incapable of any physical activity by early

afternoon (TT 2235-51, 2273-75), and by evening he would have been dead (TT 2275-79).

E. Statement of Facts: 1964 Hearings.

Evidence taken at the habeas corpus hearings in 1964 was limited to the issues of (1) illegal search and seizure, (2) illegally-taken statements, and (3) incompetent counsel (CT 304-11).

Search of the Bates Car.

Soon after the Mecca Bar fire, Sergeant Tidyman, who was conducting the investigation, was informed by Joyce Chapdelaine, a waitress there, that one of the men who had thrown the gas was named "Oscar" and was known by the Jacobsen brothers, while another looked like Officer Otis Green and was a "brother" of the Jacobsens. Tidyman instructed Officers Clyde Call and Richard Irwin to contact the Jacobsens and see if they would direct the officers to "Oscar." (HCT 588-90, 651, 657, 675, 700.)

The two officers went to the Jacobsen home and inquired about "Oscar." (HCT 334, 366-69, 399, 429.) The Jacobsens led the officers to the Bates residence where, in the driveway, a car was found which matched the description of that seen speeding from the scene of the crime. (HCT 341, 368-70, 399, 462.) Inside it were a man identified as "Oscar" and another

who looked like Otis Green -- the descriptions fitting those of two of the participants in the crime. (HCT 339-41, 344, 348, 366, 369, 429, 436-37.) When the car door was opened, a strong smell of gasoline came from inside. (HCT 368-69, 371-72, 435.) The tailpipe was felt and found to be warm. (HCT 437-38). Both Bates and Brenhaug were then arrested and taken to the 77th Street police station.

Before leaving with their prisoners, Irwin locked Bates' car (HCT 373, 567). The officers intended to return after delivering the suspects to the police station, since they were mindful of the volatile nature of gasoline (HCT 439-41, 445, 567). Upon hearing that they smelled gasoline inside the car, Tidyman instructed them to return and drive it to the station for chemical examination (HCT 442, 592-93). The car arrived at the station at about 5:00 a.m. (HCT 393-94, 695). Tidyman then instructed a chemist to make an immediate examination of the car (HCT 593). No warrant was sought since Tidyman felt that, due to the volatile nature of gasoline, the evidence would literally evaporate before the courts were open and a warrant could be procured (HCT 658-59, 695-97).

Seizure of Chavez' Jacket.

After identifying themselves as police officers, Officer Robert Sluder and his partner were invited into the Chavez residence by Mrs. Chavez (HCT 737, 748, 847). The actual circumstances surrounding the sighting of the jacket were subject to two conflicting versions. Mrs. Chavez testified that the officers asked if they might look in a closet at one of her husband's jackets and that she gave them permission to do so (HCT 717, 721-25, 749-52, 757-59). Officer Sluder stated that after being asked if she would show them the jacket her husband had worn the night before, Mrs. Chavez went to the closet and brought it to them, later putting it back in the closet (HCT 854-56). Mrs. Chavez voiced no objections to anything the officers did (HCT 750-51, 757-59). When Chavez arrived home and was arrested, the officers told him to get this jacket (HCT 882-83, 901).

Illegally-Taken Statements.

All three principals in the crime testified as to the circumstances of interrogation and custody. Hernandez claimed that he had been terrorized with threats of the gas chamber if he didn't cooperate by corroborating the Brenhaug statement (HCT 68, 70, 215-17, 220-21, 230-36). He also stated that he had been promised release if he

confessed and that all of his statements were fabrications to ensure advantageous treatment by the police (HCT 34-35, 39-40, 86-87, 91, 116-23, 128, 151-57). He denied knowledge of the crime. Both interrogating officers, however, testified that Hernandez was not threatened or promised immunity or leniency, that the gas chamber was never mentioned, that Hernandez' first admissions (which were given before he was apprised of Brenhaug's statements) were substantially identical to those following, and that Hernandez had never denied knowledge of the crime (HCT 604, 607-12, 621-22, 660, 665-68, 809-10, 824-25, 832). The first admission, the substance of which did not vary from subsequent admissions, was obtained shortly after the first interrogation of Hernandez had begun (see HCT 602-03, 1021, 1028).

Chavez claimed that he had been told he was going to the gas chamber if he didn't cooperate with the police, that he had been handcuffed to a chair for twelve to fourteen hours during interrogation, and that his numerous requests for an attorney had been denied (HCT 886-89, 891-92). He also declared that he had never confessed and had refused to say anything until he had spoken to his attorney (HCT 922, 925-26). The interrogating officers, however, testified that no threats against Chavez had ever

been made, and that he was never subjected to twelve hours of continuous handcuffing or interrogation (HCT 1012, 1020-21, 1025-26).

Bates gave no testimony suggesting coercion (see HCT 970-1000).

Incompetent Counsel.

"At the time of the evidentiary hearing no affirmative showing was made, nor was any evidence adduced or otherwise produced, regarding the asserted inadequacy of counsel."
(CT 371)

APPELLANT'S CONTENTIONS

1. The failure of appellants' trial counsel to object to the introduction of illegally-seized evidence requires the granting of the writs.

2. The introduction into evidence of the "accusatory statements" deprived appellants of due process of law and requires a reversal of the judgment.

A. Johnson v. New Jersey did not preclude an examination into this question.

B. The record shows that, even if "not oppressive," the questioning that resulted in the "accusatory statements" was psychologically of such a nature as to require a reversal of the order below.

3. Recent decisions establish that the use of an extrajudicial statement, without opportunity to cross-examine, is a denial of due process of law.

4. The harmless-error rule cannot save these convictions.

5. Points applicable only to appellant Bates:

A. The failure of Bates' trial counsel to call witnesses to establish his defense of diminished responsibility deprived him of due process of law.

B. The use made of his prior convictions deprived Bates of due process of law.

SUMMARY OF APPELLEE'S ARGUMENT

I. The failure of appellants' trial counsel to object to allegedly illegally-obtained evidence does not establish that appellants were denied the effective representation of counsel.

A. The search of the Bates car was legal.

B. The seizure of the Chavez jacket was legal.

C. Counsels' restraint in refraining from making frivolous objections was not incompetence.

II. The use of the Hernandez admission and the joint statement did not deprive appellants of due process.

A. The Johnson case precludes an examination of the question of whether either appellants or Hernandez were advised of their constitutional rights and waived those rights.

B. The reading of neither the Hernandez admission nor the joint statement prejudiced either Bates or Chavez.

1. The Hernandez admission was not received against either Bates or Chavez.

2. The joint statement was not received against Chavez.

3. The joint statement was admitted against Bates only insofar as his own conduct manifested an admission, but the use thereof did not constitute federal error.

4. It is not federal constitutional error to receive a confession or admission of one defendant in a joint trial, even though the confession or admission implicates his codefendants, when the jury is given limiting instructions.

C. The claim that Hernandez was coerced does not result in federal constitutional error as to Bates and Chavez.

D. Hernandez was not coerced.

III. Appellants were not denied the opportunity to cross-examine a witness against them.

IV. Application of California's harmless-error rule does not raise a federal question.

V. Trial counsel adequately presented appellant Bates' defense of diminished responsibility.

VI. Appellant Bates was not deprived of due process when his prior convictions were mentioned.

A. The restriction of Bates' explanation of his prior convictions was neither prejudicial nor erroneous.

B. The instructions, limiting the use to be made of the prior convictions, precluded prejudice.

C. Failure to object precludes Bates from now complaining that he was "forced" to admit the prior convictions.

D. Bates cannot attack the constitutionality of the prior convictions on the grounds established by Arketa.

ARGUMENT

I

THE FAILURE OF APPELLANTS' TRIAL
COUNSEL TO OBJECT TO ALLEGEDLY
ILLEGALLY-OBTAINED EVIDENCE DOES
NOT ESTABLISH THAT APPELLANTS WERE
DENIED THE EFFECTIVE REPRESENTATION
OF COUNSEL

Appellants' claim that trial counsel were so incompetent that the trial became a farce and a sham in the constitutional sense because they failed to object to the admission of two items of evidence: matting from the Bates car and Chavez' jacket. But as Judge Carter observed in his final order of June 29, 1966, "The real questions raised by the evidence [during the hearings] were whether there was an unlawful search and seizure in connection with Bates' car, and in connection with Chavez' jacket" (CT 371). The present assertion of incompetent counsel is only a thinly-veiled attempt to avoid the effect of Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965).

Commencing with the filing of the present petitions in February, 1963, and continuing through the evidentiary hearing in May, 1964, the principal claim of the petitioners was that illegally-obtained evidence had been used against them and that consequently, their convictions were vulnerable under the rule of Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1084 (1961). The brightest gem in their firmament of claims was the search of

Bates' car. Since the car was examined at the police station and part of the floormat removed without a warrant some two hours after Bates was arrested and the car seized at his home, petitioners tried to bring themselves under the protective arm of Preston v. United States, 376 U.S. 364, 84 S. Ct. 11 (1964). They also attacked the taking of Chavez' jacket when he was arrested on the ground that his wife had not consented to the previous so-called search which disclosed that jacket.

In response to these claims, the State argued first that the petitioners should have objected at trial since California law at that time (1957) made the product of an unreasonable search and seizure inadmissible. Secondly, the State contended that the searches were reasonable.

As a kind of replication to the State's plea of waiver, the petitioners argued, well, if the privately-retained attorneys for Bates and Chavez failed to object to this evidence, then this proves that they were incompetent.

The major issue in the case was suddenly removed in June of 1965 by Linkletter v. Walker, 381

U.S. 618, 85 S. Ct. 1731 (1965). Since the petitioners' convictions were final in the Linkletter sense by 1959 when certiorari was denied by the United States Supreme Court, some two years prior to the decision in Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1084 (1961), it became immaterial whether evidence used against them was the product of an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments. The district judge so held (CT 370).

In a last, final gasp of desperation, petitioners' argument comes full circle and they claim a denial of due process of law because their trial attorneys failed to exclude the evidence in question under state -- not federal -- law.

Their present grievance concerns the "failure of trial counsel to object to the receipt of this evidence -- an objection which, in California, would have been good in the light of People v. Cahan, . . ." (AOB 9). But appellants have failed to cite a single California case which would support their claim that the searches and seizures herein were illegal. The absence of any supporting authority, we suggest, is compelled by the fact that, under California law, the searches and seizures were both

legal.

A. The Search Of The Bates Car Was Legal.

Pursuant to directions given and information received through official channels, police officers went to the Jacobsen home in search of information about one of the participants in the crime who was known as "Oscar" (TT 1281; HCT 334, 366, 368-69, 399, 429). The Jacobsens led the officers to the Bates residence where they found a car matching the description of that seen speeding from the scene of the crime (TT 1287; HCT 341, 368-70, 399, 462). Inside it were a man identified as "Oscar" and another who looked like Officer Otis Green -- the descriptions fitting those of two of the suspects (HCT 339, 341, 344, 348, 366, 369, 429, 436-37). When the car door was opened, a strong odor of gasoline came from inside (TT 1288-89; HCT 368, 371-72, 435, 564, 584-85).

These observations, linking the occupants of the car to the crime, were sufficient to justify the arrest of Bates and Brenhaug. E.g., People v. Woods, 139 Cal.App.2d 515, 523-24, 293 P.2d 901, 907 (1956), cert. denied, 352 U.S. 1006, 77 S. Ct. 566 (1957); People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582, 585-86 (1955). An arrest made with reasonable

cause therefore permits a search incidental thereto and without a warrant for purposes of seeking evidence related to the crime. People v. Webb, 66 A.C. 99, 424 P.2d 342 (1967); People v. Borbon, 146 Cal.App.2d 315, 319, 303 P.2d 560, 563 (1956) (search of auto incident to arrest); People v. Winston, 46 Cal.2d 151, 162-63, 293 P.2d 40, 46-47 (1956).

Where a valid arrest has been made, and where a search of an automobile as incident to that arrest has disclosed incriminating evidence, it is permissible for police officers to lock that vehicle, remove the accused to a place providing secure detention, return to the vehicle and move it to a police station, and then search the vehicle at the place to which it has been removed, all without a search warrant. People v. Talbot, 64 Cal.2d 691, 708-09, 414 P.2d 633, 644-45 (1966), cert. denied, 385 U.S. 1015, 87 S. Ct. 729 (1967). In Talbot, the accused was arrested at his home on suspicion of murder. One of the arresting officers noticed smears of what appeared to be human blood on Talbot's car which was parked nearby. The doors and trunk of the car were sealed with stickers and the car was

removed to the police station. Several days later, the seals were broken and criminalist examined the interior, dusting for fingerprints and making blood tests. The California Supreme Court held that once it became apparent that the smears were human blood, it was both reasonable and proper to seal the car for later and more scientific examination.

"This finding [a presumptive test for blood], in conjunction with the surrounding circumstances, warranted a reasonable search of the entire automobile, and it was proper to seal the trunk area for a later, more scientific examination as part of the reasonable search process.

"

"Under the circumstances, the sealing of the trunk was the initial step taken in the process of scientific investigation, and the actions of the authorities with reference to the automobile were proper." Ibid.

In the present case, the investigating officers had found a car matching the description of that used by the participants in the crime, inside the car were two men fitting the descriptions of two of the suspects, and from inside the car emanated the

odor of gasoline which was the instrumentality by which the crime had been committed. "This finding, in conjunction with the surrounding circumstances, warranted a reasonable search of the entire automobile" Id., 64 Cal. 2d at 708, 414 P.2d at 644. After removing the suspects from the car, the police officers rolled up the windows, locked the doors, and took the keys (HCT 373, 566-67). The car was subsequently removed by the same arresting officers, taken to the police station, and examined by a chemist.

The Talbot case establishes the permissibility of what might be termed a "continuing search." It holds that if, at the time of arrest, the police officers could have conducted an extensive examination of the vehicle, it is not unreasonable to secure the contents thereof from destruction or tampering such that the evidence may be preserved for later scientific examination, and that such a subsequent search of the secured vehicle is to be considered in the same light as a search conducted at a time contemporaneous to the arrest. Id., 64 Cal.2d at 708-09, 414 P.2d at 644-45. Such a permissible method was

employed with reference to the Bates vehicle and is not subject to objection.

The search herein was also reasonable on another ground: that of emergency. In People v. Terry, 61 Cal.2d 137, 152-53, 390 P.2d 381, 391 (1964), cert. denied, 379 U.S. 866, 85 S. Ct. 132 (1964), a search of an automobile was upheld though that search was removed in both time and place from the arrest of the defendant. In People v. Burke, 61 Cal.2d 575, 580, 394 P.2d 67, 70 (1964), the Terry case was distinguished from Preston v. United States, 376 U.S. 364, 84 S. Ct. 881 (1964), on the ground that had the police officers been compelled to obtain a search warrant before searching the vehicle, the evidence might have been destroyed. The Terry case was an example of an emergency created by an external factor: the return of the accused, who had escaped from the police, would have resulted in a loss of the evidence. In People v. Huber, 232 Cal.App.2d 663, 43 Cal.Rptr. 65 (1965), however, the emergency was created by an inherent factor: the nature of the evidence was such that it would destroy itself if not immediately seized. Huber involved a blood sample taken from an injured and

unconscious driver who was strongly suspected of being drunk.

"[I]t was taken for the purpose of reducing the alcohol in the defendant's blood to possession -- to protect the alcohol content in the blood from destruction and preserve it for presentation to the court. There was no other way to prevent the disappearance or destruction of the evidence"

Id., 232 Cal.App.2d at 670-71, 43 Cal. Rptr. at 69-70.

From the evidence presented below it is abundantly clear that the official in charge of the investigation and who ordered the search of the Bates car did not seek a warrant because he felt that, due to the volatile nature of gasoline, the evidence would literally evaporate before the courts would open and a warrant could be procured (HCT 658-59, 695-97). This factor -- the volatility of the gasoline -- which was inherent in the very nature of the evidence itself, created an "emergency" which permitted, under California law, a search without a warrant. People v. Terry, *supra*, 61 Cal.2d at 152-53, 390

P.2d at 391, as explained in People v. Burke, supra, 61 Cal.2d at 580, 394 P.2d at 70; ibid.

B. The Seizure of the Chavez Jacket Was Legal.

It is also evident that Mrs. Chavez consented to the search which resulted in the discovery of Chavez' jacket (see HCT 717, 721-25, 737, 741-42, 748-52, 757-59, 847, 854-56). Under the rules set out in People v. Carter, 48 Cal.2d 737, 746, 312 P.2d 665, 670 (1957), the search was proper.

"When the husband is absent from the home it is the wife who controls the premises, . . . and with her husband's tacit consent determines who shall and who shall not enter the house on business or pleasure and what property they may take away with them When the usual amicable relations exist between husband and wife . . . , and the property seized is of a kind over which the wife normally exercises as much control as the husband, it is reasonable to conclude that she is in a position to consent to a search and seizure of property in their home.

If . . . [defendant's wife] freely consented to the removal of defendant's property, there was no unreasonable search or seizure" Ibid.

The Carter case clearly holds that where clothing is voluntarily produced for officers by the wife of a defendant, the visual evidence (seeing the clothing) and the physical evidence (the clothing itself) is admissible.

"[T]he evidence supports the conclusion that . . . [defendant's wife] freely consented to their entering the living room to question her about defendant's activities What evidence they gained from their conversation and observation was therefore admissible. Moreover, the evidence that . . . [defendant's wife] freely cooperated with the officers on this visit, produced the trousers when she was requested to do so, and consented to the subsequent taking of the shirt, supports the trial court's conclusion that she also consented to . . . [the] taking [of] the trousers" Ibid.

Mrs. Chavez consented to the entry of the officers (HCT 737, 748, 847) and to the search which resulted in discovery of the jacket. The testimony concerning the discovery is in conflict. Mrs. Chavez stated that the officers asked permission to look in the closet and then did so (HCT 717, 721-25, 749-52, 757-59). Officer Sluder testified that, after being asked if she would show them the jacket, Mrs. Chavez went to the closet and brought the jacket to the officers, replacing it in the closet later (HCT 854-56). Hence, under either version of the facts, the search was consensual.

Though the search was made when the officers sighted the incriminating jacket, the seizure was accomplished when Chavez arrived home and was asked to get it. Because the search was proper, so too was the seizure. Chavez was arrested for committing the felonies of arson and murder. It is axiomatic that evidence in the control of the person arrested may be seized at the time of arrest. People v. Winston, 46 Cal.2d 151, 162, 293 P.2d 40, 46-47 (1956).

C. Counsel's Restraint In Refraining
From Making Frivolous Objections
Was Not Incompetence.

The restraint of the trial attorneys is indicative of professional ability rather than incompetence.

"Defense counsel is to be complimented for remembering that he who often objects, only to have his objections over-ruled, risks alienating the jury even if he does not test the patience of the presiding judge." Williams v. Beto, 354 F.2d 698, 703 (5th Cir. 1965).

Whether a state prisoner has been denied due process of law by reason of incompetent counsel -- particularly when that counsel is privately retained -- must rest not on whether an objection is made to one or two items of evidence but on a complete evaluation of the trial record.

"Assuming that counsel erred . . . in failing to object to the admission of evidence, more is required to constitute denial of the effective assistance of counsel guaranteed by the Six Amendment." Rivera v. United States, 318 F.2d 606, 608 (9th Cir. 1963); Cf., Bouchard v. United States, 344 F.2d 872, 874-75 (9th Cir. 1965).

In evaluating the foundation for appellants' charges, it must be remembered that it is only a gross degree of incompetence which warrants a finding that a defendant has been denied the effective assistance of counsel.

"One who asserts that his attorney did not provide legal representation adequate to meet the requirements of the Sixth Amendment has a heavy burden to sustain. This court has repeatedly held that it is . . . necessary to show that counsel was 'so incompetent or inefficient as to make the trial a farce or mockery of justice.'" Reid v. United States, 334 F.2d 915, 919 (9th Cir. 1964).

The right to counsel does not mean perfect counsel or counsel who, upon hindsight judgment, can be found without error, but counsel which has rendered reasonably effective assistance. Pineda v. Bailey, 340 F.2d 162, 164 (5th Cir. 1965). Competency must be judged in the light of the entire trial record, and it is not determined by an absence of technical flyspecks when examined with the magnification of hindsight.

"[E]rrors [in judgment], even if they indicate a lack of skill, do not vitiate the trial, unless on the whole the representation was of such a low caliber as to amount to no representation and to reduce the trial to a farce." Lyons v. United States, 325 F.2d 370, 377 (9th Cir.), cert. denied, 377 U.S. 969, 84 S. Ct. 1650 (1964).

The district judge heard evidence and carefully examined the lengthy trial transcript before making his evaluation of the quality of trial counsel. His findings are as follows:

"At the time of the evidentiary hearing no affirmative showing was made, nor was any evidence adduced or otherwise produced, regarding the asserted inadequacy of counsel. Suffice, that the lengthy trial record has been carefully examined and reflects affirmatively that at all stages counsel representing the petitioners exercised that degree of competence which would effectively negative any claim or contention that the petitioners were not accorded a fair trial as contemplated by

the due process clause. This was no pro forma defense for either petitioner. The prosecution witnesses were carefully cross-examined and a theory of defense was presented to the jury which found them guilty. There was ample evidence to support the verdict of the jury."
(CT 371)

"[D]enial of effective . . . assistance of counsel occurs only when performance by counsel is so incompetent that the trial becomes a farce or mockery of justice . . ., [and] this Court concludes that the instant petition certainly falls short of the mark." (CT 372)

This finding is amply supported by the evidence adduced at the habeas corpus hearings and thoroughly refutes the appellants' contentions.

II

THE USE OF THE HERNANDEZ ADMISSION AND THE JOINT STATEMENT DID NOT DEPRIVE APPELLANTS OF DUE PROCESS

Appellants claim that they suffered deprivation of due process through the evidential use of "accusatory statements" made by Hernandez

(AOB 12-13). The exact nature of the complaint, however, is not clear, since the argument confuses both the facts and the characters.

Before proceeding further, then, it is necessary to make two observations. (1) The trial involved the use of two separate statements. (2) In each case, the jury was instructed that the evidence was to be considered only for limited purposes.

The first Hernandez statement was made on April 7, 1957. It was in the nature of an admission and was so proffered (TT 1403-04) and received (TT 1406). This admission was the first statement used at trial. For purposes of clarity, it will hereinafter be referred to as "the Hernandez admission."

The conversation constituting the admission was tape recorded and a transcript thereof was made. Sergeant Tidyman read the transcript aloud to the jury. But before this evidence was given, the trial judge admonished the jury as follows:

"This evidence you are about to receive now is to be received by you solely with regard to defendant Hernandez. You are not to use it in any way in regard to defendant Bates or Chavez." (TT 1433)

During the conversation, Hernandez related the events surrounding the crime (the fight, the gas purchase, the fire, and the escape), to include both his role and those of Brenhaug, Bates, and Chavez (see TT 1432-51).

The second statement, made on April 9, 1957, is better denominated the "joint statement," since it included the declarations of Brenhaug, Bates, Chavez, and Hernandez. The four men were brought together in a room and there, in the presence of each other, each was asked to tell his version of the facts. As with the Hernandez admission, the joint statement was recorded and a transcript thereof read to the jury by Sergeant Tidyman. But before the evidence was admitted, the court again gave limiting instructions.

"In this instance the Court has been informed that the defendant Chavez has denied all of the accusatory statements which were made as to him, and so in receiving this evidence it will not be received in any way in regard to the defendant Chavez." (TT 1473)

"The Court again repeats that you are not to receive any of this testimony pertaining to the defendant Chavez." (TT 1474)

The prosecutor was willing to omit any references to Chavez contained in the joint statement (TT 1456-57) but counsel

for Chavez was not.

"I feel that if the transcription is read, it should be read in its entirety, including the statements by Mr. Chavez, facing Mr. Brenhaug and Mr. Hernandez and Bates and the officers, and saying that this is a complete lie, that they're lying through their teeth."
(TT 1460; see also TT 1407, 1457-58, 1461)

The joint statement was admitted against Bates only as an accusatory statement, that is, the jury was instructed that unless the conduct of Bates indicated an admission, the conversation should be entirely disregarded:

"The Court will instruct you in regard to an accusatory statement that if you should find from the evidence that there was an occasion when the defendant, or in this case any of the defendants other than Chavez, under conditions which fairly afforded him an opportunity to reply, failed to make denial, or made false, evasive or contradictory statements in the face of an accusation, expressed directly to him or in his presence, charging him with the crime for which he now is on

trial or tending to connect him with its commission, and if you should find that he heard the accusation and understood its nature, such silence and/or conduct on his part may be considered against him as indicating an admission that the accusation thus made was true. Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only to explain the conduct of the accused in the face of it; and unless you should find that his conduct at the time indicated an admission that the accusatory statement was true, you should entirely disregard the statement." (TT 1473-74) (Emphasis added.)

This instruction was repeated in the final charge to the jury (CTT 94).

In the joint statement, Brenhaug gave a detailed description of events. Hernandez embellished the Brenhaug statement and offered corrections where he felt Brenhaug was in error. Bates disclaimed any knowledge of facts germane to the crime, asserting that he could remember nothing. Chavez declined any comment other than denying guilt. (See TT 1475-512)

Appellants' argument (AOB 12-15) confuses both the facts and the characters in regard to the statements admitted at trial. The distinctions between the two separate statements, and the limited purposes for which the evidence was admitted, must be kept in mind while analyzing the issues.

A. The Johnson Case Precludes An Examination Of The Question Of Whether Either Appellants Or Hernandez Were Advised of Their Constitutional Rights and Waived Those Rights.

Appellants assert that Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772 (1966), "does not preclude examination into the voluntariness of the statements used against criminal defendants" (AOB 11). But appellants misconstrue the ruling below wherein Johnson was held determinative only of certain issues.

In his "supplemental petition," appellant Bates contended that statements were taken from the parties accused "while . . . in custody . . . and without having been advised of their legal rights . . ." (CT 87-88). In his "amended petition," appellant Chavez claimed that "subsequent to the arrest of petitioner and . . . the other defendants, . . . all were kept in custody without having been advised of their legal rights . . ."

(CT 106). In his order of February 24, 1964, Judge Carter concluded that appellants' petitions were founded upon the use made of statements which had been taken while the parties accused were held in police custody but had not been advised of their rights (CT 307). Bates v. Dickson, 226 F.Supp. 983, 992 (N.D. Cal. 1964). The same basis for the assertions made in the petitions was also noted in the joint pre-trial order of May 5, 1964 (CT 328, 331, 333). Thus it is clear that throughout these proceedings petitioners have urged that any statements or admissions received in evidence were inadmissible because the declarants had not been advised of their rights of silence and to counsel.

Conspicuously absent from the petitions are allegations of brutality and coercion. Petitioners did, however, raise the innuendo of coercion by two allegations. First, it was claimed that Hernandez had been threatened with the gas chamber unless he cooperated (CT 331). Secondly, Chavez claimed that he was both threatened with the gas chamber and handcuffed to a chair during a long period of interrogation (CT 333).*

*According to the pre-trial order, it was Bates who made these allegations (CT 333). The testimony given to support these charges during the habeas corpus hearings was all related by Chavez (HC 886, 888-89).

Bates made no complaints whatever. Though testimony to this effect was elicited from Hernandez (HCT34-35, 39-40, 68-70, 86-87, 91) and Chavez (HCT886, 888-89), the interrogating officers denied both threats and physical abuse (as to Hernandez, HCT604, 607-12, 621-22, 660, 665-68, 809-10, 824, 825, 832; as to Chavez, HCT946, 956, 1012, 1020-21, 1025-26). The finding of the court below was, "There were no coerced confessions or admissions." (CT 371)

The court below ruled that "the subsequent holding of Johnson . . . forecloses inquiry into the claimed illegal accusatory statements." (CT 370)

This holding was the necessary consequence of the finding that "there were no coerced confessions or admission," leaving only the petitioners' claims that they had not been properly apprised of their rights as the foundation of their allegations. Johnson does preclude inquiry into this only remaining basis for their claims, since appellants were tried in 1957, almost nine years before Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (June 13, 1966). Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772 (1966).

B. The Reading Of Neither The Hernandez Admission Nor The Joint Statement Prejudiced Either Bates or Chavez.

The gravamen of appellants' attack upon the admissibility of the Hernandez admission and the joint statement is the allegation that they were involuntary. This question can be reached, however, only in the event that appellants can show that the evidence in question was used against them. This prerequisite can not be met.

1. The Hernandez admission was not received against either Bates or Chavez.

It has been held that the Hernandez statement of April 6 was properly admitted against Hernandez, with adequate instructions limiting the evidence to him only, and that neither appellant can complain that he might have been prejudiced thereby. Chavez v. Dickson, 280 F.2d 727, 736 (9th Cir. 1960); People v. Chavez, 50 Cal.2d 778, 790, 329 P.2d 907, 915 (1958).

"The fact that certain evidence is prejudicial is immaterial if in fact it was admissible. No federal question of fact or law was raised as to the reading of Hernandez' statement." Chavez v.

Dickson, supra, 280 F.2d at 736.

2. The joint statement was not received against Chavez.

It has also been held that appellant Chavez was not prejudiced by admission of the joint statement. Chavez v. Dickson, supra, 280 F.2d at 736; People v. Chavez, supra, 50 Cal.2d at 791, 329 P.2d at 915.

"The California Supreme Court held that the statement was properly admitted as to Hernandez and that as to Chavez a proper cautionary instruction had been given. It follows that as to Chavez the reading of the Brenhaug statement presents no federal question of fact or law. Accordingly, as to him we reach the same conclusion as stated above with respect to the Hernandez statement." Chavez v. Dickson, supra, 280 F.2d at 736.

3. The joint statement was admitted against Bates, only insofar as his own conduct manifested an admission, but the use thereof did not constitute federal error.

As to appellant Bates, it has been held that part of the joint statement was properly admitted against him, while part of it was inadmissible under state law. People v. Chavez,

supra, 50 Cal.2d at 791-92, 329 P.2d at 915-16. However, the error was found to be harmless. Ibid. The admission of the joint statement, though later determined erroneous based upon state grounds, did not constitute federal error. Chavez v. Dickson, 280 F.2d 727, 737 (9th Cir. 1960).

"[I]t is our view that the reading of that statement, which was error in so far as Bates is concerned, was not so prejudicial as to constitute a denial of fundamental fairness essential to the concept of justice." Ibid.

4. It is not federal constitutional error to receive a confession or admission of one defendant in a joint trial, even though the confession or admission implicates his codefendants, when the jury is given limiting instructions.

Before the Hernandez admission was received as evidence, the trial judge admonished the jury that the admission could not be considered in any way in regard to either Bates or Chavez (TT 1433).

Before the joint statement was admitted, the trial court again gave similar instructions.

The jury was not to consider any of the statements in respect to Chavez (TT 1473-74). In regard to Bates and the other defendants, the jury was carefully instructed on the nature of accusatory statements and that unless the conduct of the particular defendants indicated an admission that the accusatory statement was true, the entire statement should be disregarded (TT 1474). The trial court also pointed out that it was not the statement which might possibly be received as evidence, but "the conduct of the accused in the face of it" (TT 1474).

In Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294 (1956), there was a conspiracy of five persons of whom only Whitley confessed. This confession, without any deletions of the names of the non-confessing codefendants, was admitted under the instruction that it was limited to Whitley. The United States Supreme Court observed that a confession of one codefendant is admissible against him under appropriate limiting instructions. Id., 352 U.S. at 237, 77 S. Ct. at 297.

"[P]ossible prejudice against other defendants may be overcome by clear instructions limiting the jury's consideration of a . . . declaration solely to the determination of the guilt of the declarant" Id., n. 5, 352 U.S. at 239, 77 S. Ct. at 299.

The limiting instructions in Delli Paoli (352 U.S. at 239-40, 77 S. Ct. at 299) were strikingly similar to those given during appellants' trial (TT 1433, 1473-74; CT 98). The Delli Paoli decision suggested that such instructions must be presumed as followed, obviating prejudice, where: (a) the crime was not complex; (b) the interests of the codefendants were separately protected by separate counsel; (c) the confession was corroborated by ample facts, and was cumulative of facts already produced at trial; and (d) there is nothing in the record to suggest that the jury was confused and failed to follow instructions. Id., 352 U.S. at 241-42, 77 S. Ct. at 299-300. The circumstances assuring that the instructions were followed in Delli Paoli are on all fours with the circumstances herein.

The Delli Paoli case continues to be cited for the proposition that prejudice against codefendants is precluded when evidence admissible only against one is

limited to that single defendant. See Spencer v. Texas, 385 U.S. 554, 562, 87 S. Ct. 648, 653 (1967); Wong Sun v. United States, 371 U.S. 471, 489, 83 S. Ct. 407, 419 (1963). In its most recent opportunity to reconsider the Delli Paoli case, and to instead adopt the principle established in People v. Aranda, 63 Cal.2d 518 407 P.2d 265 (1965), the United States Supreme Court has declined to do so. Gilbert v. California, ___ U.S. ___, 35 U.S.L.W. 4614, 4615-16 (June 12, 1967). The Delli Paoli rule is controlling here and appellants cannot claim prejudice since the evidence complained of was not admitted against them.

Appellants urge that the efficacy of limiting instructions is a "fiction" which is being "steadily rejected" (AOB 20-21). In support of this novel proposition, appellants cite but two cases: Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294 (1956); and People v. Aranda, 63 Cal.2d 518, 407 P.2d 265 (1965). Appellants conveniently ignore Spencer v. Texas, 385 U.S. 554, 562, 87 S. Ct. 648, 653 (1967), however, which discusses at length the effectiveness of such instructions in precisely the situation of which appellants complain. Nor does Aranda purport to base its holding upon any constitutional principles. Instead, the Aranda decision was deemed necessary to effectuate a section of the

California Penal Code.

"In the absence, however, of a holding by the United States Supreme Court that the due process clause requires such change, the rules we now adopt are to be regarded, not as constitutionally compelled, but as judicially declared rules of practice to implement section 1098." People v. Aranda, supra, 63 Cal.2d at 530, 407 P.2d 272.

That Aranda is but a "judicially declared rule of practice" is further supported by the refusal of the California Supreme Court to give it retroactive application. "The purposes of Aranda do not require its application to convictions long since final." People v. Charles, 66 A.C. 325, 328, ___ P.2d ___, ___ (1967).

C. The Claim That Hernandez Was Coerced Does Not Result In Federal Constitutional Error As to Bates and Chavez.

The basis of appellants' claim is that the Hernandez admission and his participation in the joint statement were the product of coercion. Claims of coercion launched against the Hernandez admission and his participation in the joint statement are of dubious applicability to appellants. Neither the admission nor the joint statement was admitted against Chavez (TT 1433, 1473-74). The

admission was not received against Bates (TT 1433), nor was the Hernandez participation in the joint statement admitted against him (TT 1474). In reference to the joint statement, the only thing admitted against Bates was his evasive or equivocal conduct, and not the substance of anything Hernandez said (TT 1474). Bates himself did not claim, through his testimony at the 1964 hearing (HCT 970-1000), that his own participation in the joint statement was the product of coercion. Assuming, contrary to both the evidence and the findings of the district judge, that Hernandez was coerced, appellants cannot trade in his constitutional rights for their benefit.

In Malinski v. New York, 324 U.S. 401, 65 S. Ct. 781 (1945), three persons were convicted of a murder committed in the course of a robbery. Malinski confessed to the crime under circumstances held to be coercive. Id., 324 U.S. at 405-10, 65 S. Ct. at 783-86. His codefendant, Rudish, did not. The Supreme Court was "asked to reverse as to Rudish because the confession . . . which was introduced in evidence against Malinski was prejudicial to Rudish." Id., 324 U.S. at 410-11, 65 S. Ct. at 786. But the Court refused, basing its decision on the following factors: (a) though

a coerced confession of one codefendant may permit reversal as to all codefendants in a federal trial, in state trials the effect of a reversal as to one is to be determined only by state procedure; (b) the jury was instructed that the confession was admissible against Malinski alone; and (c) there was substantial evidence to sustain the convictions exclusive of the confession. Id., 324 U.S. at 411-12, 65 S. Ct. at 786-87.

The Malinski decision was also based upon the fact that the names of the nonconfessing defendants were deleted. In Stein v. New York, 346 U.S. 156, 194, 73 S. Ct. 1077, 1098 (1953), however, the Malinski deletion was considered unimportant. That deletion of the codefendants' names is not required is also suggested by Delli Paoli v. United States, 352 U.S. 232, 77 S. Ct. 294 (1956).

In Stein v. New York, 346 U.S. 156, 73 S. Ct. 1077 (1953), three defendants were tried for felony murder. Two of the defendants later confessed, but Wissner did not.

"Wissner never confessed, but he was implicated by those who did. His objections raise questions of admissibility of the

confessions to which he was not a party.

"However, we find as regards Wissner no constitutional error such as would justify our setting aside his conviction.

". . . [E]ven if the confessions were considered to have been involuntary, their use would not have violated any federal right of Wissner's . . . [citing Malinski]." Id., 346 U.S. at 194, 73 S. Ct. at 1097.

The Stein case bases its conclusion that no constitutional issue is raised when a confession implicating a non-confessing codefendant is admitted, where the confession was limited in admissibility, upon the Malinski decision. Other facets of the Stein decision have, of course, been overruled in part by two later decisions. In Jackson v. Denno, 378 U.S. 368, 391, 84 S. Ct. 1774, 1788 (1963), Stein was overruled insofar as it approved the New York court procedure concerning the admission of confessions into evidence when voluntariness has been placed in issue. In Pointer v. Texas, 380 U.S. 400, 406, 85 S. Ct. 1065, 1069 (1965), Stein was overruled insofar as it stated that the Sixth Amendment did not apply to the states. In neither of these cases, however, was the holding on the codefendant's inability to invoke the constitutional protections afforded another overruled or

questioned.

It is clear that Stein has not been overruled on this point. Jackson v. Denno, 378 U.S. 368, 376, 84 S. Ct. 1774, 1780 (1963), which overrules Stein in part, cites Malinski approvingly though for a different proposition. The Malinski holding, and its descendant in Stein, are still determinative. Jones v. United States, 342 F.2d 863, 867 (D.C. Cir. 1964).

The holdings in Malinski and Stein are also supported by logic. As Delli Paoli so clearly stated, where instructions are given to the jury, admonishing them that certain evidence is not to be considered against several of the defendants, then it must be presumed that the jury followed these instructions. Delli Paoli v. United States, 352 U.S. 232, n. 5 at 239, 241-42, 77 S. Ct. 294, n. 5 at 299, 299-300 (1956).

D. Hernandez was not coerced.

Appellants claim that Hernandez was psychologically coerced into confessing and implicating them in the joint statement (AOB 12-15). Appellants' recitation of the purported facts in support of this assertion, however, reflects a misapprehension of the record (AOB 13).

At the time of his arrest, Hernandez was 18 years old. When first interviewed by Sergeants Tidyman

and Little on April 6, 1957, Hernandez related in substance the events later repeated in his recorded admission and the joint statement (HCT 603-07, 611). This interview was made before Hernandez had been apprised of Brenhaug's statements (HCT 608, 809-10, 824), and his initial admissions were made in the first interview after he was arrested (see HCT 602-03, 1021, 1028).

During all of the interviews (unrecorded interview of April 6, recorded admission of April 7, and recorded joint statement of April 9), Hernandez was very cooperative (HCT 620-21, 659-60, 837). He volunteered information and never refused to answer any questions asked (HCT 668). The interrogating officers did not threaten him, did not mention the death penalty or the gas chamber, did not promise immunity or leniency, and did not offer to release him if he corroborated Brenhaug (HCT 621-22, 660, 665-68, 825, 832-33).

Appellants' recitation of the "facts" (AOB 13) appears to be based solely upon the testimony of Hernandez during the 1964 hearings, and totally ignores the testimony of the interrogating officers summarized above. The court below found that "there were no coerced

confessions or admissions" (CT 371). This finding of fact is amply supported by the record and refutes the allegation of "psychological coercion."

To bolster their argument, appellants have cited a number of inapposite cases (AOB 14-15). Hernandez was 18, and not of tender years. See Gallegos v. Colorado, 370 U.S. 49, 82 S. Ct. 1167 (1962); Haley v. Ohio, 332 U.S. 596, 68 S. Ct. 302 (1948). He was not told he would be held incommunicado until he confessed. See Haynes v. Washington, 373 U.S. 503, 83 S. Ct. 1336 (1963); Ledbetter v. Warden, Maryland Penitentiary, 368 F.2d 490 (4th Cir. 1966), cert denied, ___ U.S. ___, 87 S. Ct. 1162 (1967); United States ex rel. Williams v. Fay, 323 F.2d 65 (2d Cir. 1963), cert. denied, 376 U.S. 915, 84 S. Ct. 667 (1964). He was not confronted with a situation contrived to subvert his will through his emotions. See Culombe v. Connecticut, 367 U.S. 568, 81 S. Ct. 1860 (1960); Lynum v. Illinois, 372 U.S. 528, 83 S. Ct. 917 (1963); United States ex rel. Williams v. Fay, supra, 323 F.2d 65. He was neither illiterate nor mentally defective. See Culombe v. Connecticut, supra, 367 U.S. 568, 81 S. Ct. 1860. To the contrary, Hernandez volunteered information and freely cooperated with the

investigating officers. Hernandez made no claim that he was held incommunicado. Unlike all of the cases cited by appellants, with the exception of Gallegos, Hernandez never denied complicity in the crime. In Gallegos, the accused was only 14 and freely confessed to a robbery which later ripened into murder through the subsequent death of the victim. Hernandez was much older and more experienced, and it cannot be said that at the time he admitted his participation he was not aware that a murder charge could be brought against him.

Crucial to the issue of coercion is the question of time. Hernandez never claimed that he had been subjected to the grueling pressure of relentless interrogation over an extended period of time. Nor could this claim be made, for the facts clearly show that shortly after his initial interrogation, Hernandez made the first of his admissions and volunteered a detailed description of events, the substance of which did not vary in his subsequent recorded admission and the joint statement. Hernandez was arrested at 3:20 am. on April 6, 1957 (HCT 602). He was interviewed for the first time at 8:00 that same morning (HCT 603). This was the first time he was interviewed by anyone, since

only Sergeants Tidyman and Little were allowed to interrogate the suspects (HCT 1021, 1028). It was in this initial interview that Hernandez volunteered his first, detailed admission (HCT 603-08, 611).

The court below, in rejecting the version of the facts offered by Hernandez, found that the Hernandez statements and admissions were not psychologically coerced (see CT 371). This finding is amply supported by the record.

III

APPELLANTS WERE NOT DENIED THE OPPORTUNITY TO CROSS- EXAMINE A WITNESS AGAINST THEM

Appellants claim that they were denied an opportunity to confront and cross-examine Hernandez, citing Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065 (1965), and Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074 (1965)(AOB 16-20). They do not bother to mention that Hernandez was not a witness against them.

Hernandez did not testify. His admission was received only against himself and was not received against either Chavez or Bates. The joint statement was not admitted against Chavez, and insofar as Bates was concerned, the joint statement was admitted only to the degree that Bates' conduct in the face of such a

statement manifested an admission of the truth thereof. The admissibility of declarations of a codefendant, with limiting instructions, must be determined in accord with the principles defined in Delli Paoli v. United States, 352 U.S. 232, 239, 77 S. Ct. 294, 299 (1956), and discussed earlier. Pointer and Douglas are absolutely immaterial.

Finally, in both Pointer and Douglas, trial counsel objected to the introduction of evidence on the grounds that confrontation was wanting. Pointer v. Texas, supra, 380 U.S. at 401-02, 85 S. Ct. at 1067; Douglas v. Alabama, supra, 380 U.S. at 420-23, 85 S. Ct. at 1078-79. No such objection was made by appellants at trial and hence the question was not preserved. See Nelson v. California, 346 F.2d 73, 77-82 (9th Cir.), cert. denied, 382 U.S. 964, 86 S. Ct. 452 (1965). Nor was any such contention made in the district court.

IV

APPLICATION OF CALIFORNIA'S HARMLESS-ERROR RULE DOES NOT RAISE A FEDERAL QUESTION

Appellants' argument challenging application of California's harmless-error rule confuses the holding in People v. Chavez, 50 Cal.2d 778, 329 P.2d 907 (1958),

cert. denied, Chavez v. California, 358 U.S. 946, 79 S. Ct. 356 (1959), and Bates v. California, 359 U.S. 993, 79 S. Ct. 1126 (1959). The California Supreme Court ruled that there was no error as to either Bates or Chavez in the use of the Hernandez admission, and that there was no error as to Chavez in the admission of the joint statement. Id., 50 Cal.2d at 790-91, 329 P.2d 914-15. The California harmless-error rule was applied only to the admission of the joint statement against Bates. Id., 50 Cal. 2d at 791-92, 329 P.2d at 915-16.

"With respect to Bates it is clear that part of the conversation was admissible in view of the fact that he said he remembered going to the Mecca with Brenhaug, Chavez, and Hernandez, that they had a "beef" there, and that he was with Chavez and Hernandez at the Corner Café about closing time. As to the remainder of the conversation, he insisted that he did not remember, and while he did not expressly say so, it seems obvious that his position was that he was unable to remember because he was intoxicated. Under the circumstances his asserted failure to remember cannot

properly be taken as an evasive or equivocal response indicating consciousness of guilt or acquiescence in the truth of Brenhaug's account, and it follows that the conversation was erroneously admitted as to Bates We are satisfied, however, that the error does not require a reversal At the trial Brenhaug took the stand and testified to substantially the same facts as were set forth in the conversation, and he was subjected to lengthy cross-examination. This testimony, together with other evidence, amply established the case against Bates, irrespective of the erroneously admitted conversation. Indeed, Bates' position at the trial was not based on a denial of what happened on the night of April 4 but on the claim that he did not remember and that he was so intoxicated as to be guiltless of the crimes charged, a claim which the jury rejected Moreover, in receiving the conversation [TT 1473-74] and, again, in giving formal instructions to the jury [CTT 94], the court made clear that, unless the conduct of Bates indicated an admission, the conversation should be entirely disregarded, and it is

highly unlikely that Bates' response that he did not remember would have been viewed by the jury as an admission." Ibid.

The propriety of California's application of its harmless-error rule has been the subject of prior federal adjudication. Chavez v. Dickson, 280 F.2d 727, 737 (1960), cert. denied, 364 U.S. 934, 81 S. Ct. 379 (1961).

"[I]t is our view that the reading of that statement, which was error in so far as Bates is concerned, was not so prejudicial as to constitute a denial of fundamental fairness essential to the concept of justice." Ibid.

The California Supreme Court held that part of the joint statement was inadmissible against Bates, but only because it was not an accusatory statement. This, then, was wholly a question of the admissibility of evidence under state rules. "The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law." Chapman v. California, 386 U.S. 18, 21, 87 S. Ct. 824, 826 (1967).

It is arguable that the question of the admissibility of accusatory statements has been absorbed

into the realm of the Federal Constitution and can no longer be determined solely by state rules. See Miranda v. Arizona, n. 37, 384 U.S. 436, 468, 86 S. Ct. 1602, 1624-25 (1966); Developments in the Law -- Confessions, 79 Harv. L. Rev. 935, 1042-43 (1966). But if this is the case, then the federal constitutional character of such statements was only recently created by the decisions in Miranda v. Arizona, supra, n. 37, 384 U.S. at 468, 86 S. Ct. at 1624-25, Griffin v. California, 380 U.S. 609, 85 S. Ct. 1220 (1965), Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758 (1964). Ibid. And since none of those cases have been held retroactive, the admissibility of accusatory statements in a 1957 trial is not an issue of federal constitutional dimensions. Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772 (1966); Tehan v. Schott, 382 U.S. 406, 86 S. Ct. 459 (1966). Thus the state law controlled both the question of the existence of error and that of the harmlessness thereof.

Finally, since it clearly appears that the propriety of the application of California's harmless-error rule was not raised below, it cannot now be questioned for the first time.

TRIAL COUNSEL ADEQUATELY
PRESENTED APPELLANT BATES'
DEFENSE OF DIMINISHED
RESPONSIBILITY

Appellant Bates asserts that his trial counsel failed to adequately present the defense of "diminished responsibility" in that he chose not to call a number of witnesses to attest to Bates' "mental blackouts" when under the influence of alcohol (AOB 25-26). This defense was adequately presented to the jury.

The claim that trial counsel did not adequately present Bates' defense that he was intoxicated to the point of unconsciousness during the crime lacks factual support. The court below found that trial counsel had made more than adequate efforts to present such evidence.

"The trial record in Bates literally reeks with the odor of alcohol. Counsel for Bates . . . diligently pursued the question of intoxication by cross-examination of the prosecution witnesses as well as by testimony of defense witnesses

"Counsel fully and forcefully argued the question of intoxication as it related to specific intent. His argument covered eighty pages in the transcript . . . and the greater

portion of it was devoted to the evaluation of the evidence on intoxication, and its relation to the intent of the defendant. Counsel for the other defendants also fully argued the question of intoxication. One cannot read this record without the impression that the issue of the capacity of Bates to form the necessary specific intent required to support a conviction of murder was vigorously, fully and fairly presented to the jury." (CT 301-02) Bates v. Dickson, 226 F.Supp. 983, 988-89 (N.D. Cal. 1964).

Appellant Bates cannot predicate his claim of incompetent counsel upon the decision of trial counsel not to call certain witnesses whom appellant Bates considered essential to his defense. Hensley v. United States, 281 F.2d 605, 609 (D.C. Cir. 1960). Whether or not to call certain witnesses is a decision to be made according to the attorney's judgment and cannot be relied upon as the basis for a claim of incompetent counsel. Tompa v. Virginia, 331 F.2d 552, 554 (4th Cir. 1964).

VI

APPELLANT BATES WAS NOT DEPRIVED OF DUE PROCESS WHEN HIS PRIOR CONVICTIONS WERE MENTIONED

Appellant Bates contends that he was deprived of due process through the use made at trial of his prior convictions (AOB 26-28). Testimony concerning the prior convictions was elicited from Bates by his own counsel on direct examination (TT 1865-67). Thus any error was invited, if not created, by Bates and he cannot now complain.

A. The Restriction Of Bates' Explanation Of His Prior Convictions Was Neither Prejudicial Nor Erroneous.

Bates complains that when testifying, "he was not premitted to say that . . . two of them . . . were juvenile, not felony convictions, and that . . . the other two . . . resulted from guilty pleas coerced from him when he was denied the assistance of counsel, contrary to the rules laid down in Gideon v. Wainwright" (AOB 26-27).

The claim that several of the convictions were juvenile convictions is subject to the direct contradiction of the record. According to the Clerk's Transcript at trial (1957), the prior convictions were:

"Violation of the Dyer Act, a felony" (1937); "Violation of the Dyer Act, a felony" (1939); "Attempt to Escape From United States Prison, a felony" (1940); and "Burglary and Grand Larceny, a felony" (1947). (CTT 9) Bates has never offered any proof in support of his present allegations which might serve to refute the convictions appearing as a matter of record.

Bates also contends that in two of these convictions he was denied counsel contrary to Gideon. The reliance on Gideon is inappropriate since the Gideon case extended the Sixth Amendment right to counsel to the states. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963). In only one of the prior convictions was Bates tried in a state court (Tennessee in 1947). At the time he was tried, Tennessee accorded the right to appointed counsel as was later developed in Gideon. See Betts v. Brady, Appendix I (A), 316 U.S. 455, 478, 62 S. Ct. 1252, 1264 (1942).

In the last two of his federal convictions (those of 1939 and 1940), Bates was also afforded the right to appointed counsel. See Bute v. Illinois, 333 U.S. 640, 661, 68 S. Ct. 763, 774 (1948). As to the 1937 federal conviction, Bates has not at any time attempted to raise the legality of that conviction by any of the means of collateral attack available.

Certainly the 1957 trial -- which was near completion before Bates allegedly sought to challenge his prior convictions -- was not the proper forum for raising such an issue and appellant Bates cannot predicate error thereon.

B. The Instructions, Limiting The Use To Be Made Of The Prior Convictions; Precluded Prejudice.

Appellant Bates claims that the limiting instructions were ineffective and could not have precluded prejudice (AOB 27-28). But in the absence of convincing proof to the contrary, it cannot be assumed that the jury failed to heed instructions given it. Delli Paoli v. United States, 352 U.S. 232, 242, 77 S. Ct. 294, 300 (1957). Bates cannot claim that the jury failed to follow instructions in regard to the limited admissibility of the prior convictions since he has failed to sustain his burden of showing that the instructions were ignored. The instructions clearly required the jury to make a finding on the issue of guilty before any decision was made as to the existence of prior convictions (CTT 108). It seems difficult to support a charge of prejudice based on prior convictions where the jury could not have considered them until they had already found Bates guilty.

A similar contention -- that a defendant is prejudiced by evidence of prior convictions despite limiting instructions -- has been rejected by the United States Supreme Court. Spencer v. Texas, 385 U.S. 554, 87 S. Ct. 648 (1967).

C. Failure To Object Precludes Bates From Now Complaining That He Was "Forced" To Admit The Prior Convictions.

Appellant now complains that "the evidence . . . [was] forced by the Court out of the mouth of the appellant" (AOB 28) But when the trial court "forced" Bates to admit the prior convictions, no objection was made. Lack of contemporaneous objection precludes him from raising the issue now. See Nelson v. California, 346 F.2d 73, 77-82 (9th Cir.), cert. denied, 382 U.S. 964, 86 S. Ct. 452 (1965).

D. Bates Cannot Attack The Constitutionality Of The Prior Convictions On The Grounds Established By Arketa.

Appellant lastly asserts that he can now attack the constitutionality of prior convictions under the rule announced in Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967) (AOB 28). The holding in Arketa demonstrates its inapplicability to the case herein:

"[W]here the effect of a prior sentence is to deprive the trial judge of the option that he would otherwise have to grant probation, a prisoner should be able, in federal habeas corpus, to attack the validity of the prior convictions on federal constitutional grounds."

Id., at 585.

Appellant Bates was convicted of murder, a crime which did not permit probation. Hence the Arketa rule is unavailable to him.

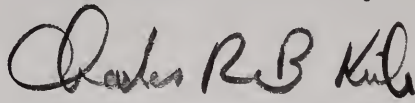
CONCLUSION

It is respectfully submitted that the order denying the petitions for writs of habeas corpus be affirmed.

Dated: June 20, 1967.

THOMAS C. LYNCH, Attorney General
of the State of California


ALBERT W. HARRIS, JR.
Assistant Attorney General


CHARLES R. B. KIRK
Deputy Attorney General

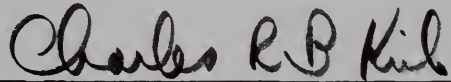
Attorneys for Respondent.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Dated: June 20, 1967.

A handwritten signature in cursive script, reading "Charles R.B. Kirk". The signature is written in dark ink and is positioned above a horizontal line.

CHARLES R.B. KIRK
Deputy Attorney General

CRBK:ck

A P P E N D I X

EXHIBIT A

Executive Department

State of California

COMMUTATION OF SENTENCE

CLYDE BATES

743143

Clyde Bates was convicted of the crime of murder in the first degree, 6 counts, on August 16, 1957, by the Los Angeles County Superior Court. On August 22, 1957, he was sentenced to be executed for these crimes in accordance with applicable law. A codefendant, Manuel Joe Chavez, received a similar sentence.

Pursuant to the mandate of Article VII of the California Constitution, I have carefully reviewed this case.

Mr. Bates was received on Condemned Row in San Quentin State Prison on August 29, 1957. Approximately a year later, on September 19, 1958, the convictions of Mr. Bates and his codefendant Chavez were affirmed by the California Supreme Court.

Since that date, Mr. Bates has had three separate execution dates. He was first scheduled to be executed on January 16, 1959, but this execution was stayed by a Justice of the California Supreme Court. Bates was next scheduled to be executed on August 14, 1959, but this execution was stayed by a federal judge. Bates was next scheduled to be executed on February 27, 1963, but this execution was stayed by a federal judge to allow further legal proceedings. This last stay of execution was granted on February 26, 1963, the day before Bates was to be executed. The case has remained pending in the courts since that date.

Almost four years ago I reviewed this case, and I announced at that time that I would not intervene. However, I have now concluded that the execution of Mr. Bates would no longer be in the best interests of justice.

By virtue of the senseless and stupid act of Mr. Bates and his codefendant of throwing gasoline into a crowded bar and then igniting it, six persons lost their lives, and two more were seriously injured. There is no question in my mind of the guilt of Mr. Bates. He was intoxicated at the time, which may explain his senseless crime but certainly does not justify it.

But I can no longer ignore the fact that Mr. Bates has now been confined on Condemned Row in San Quentin State Prison for a period in excess of 9½ years. During this time, he has faced imminent execution on three separate occasions, but each time a court has intervened. The case of Mr. Bates is a living example of what I believe to be the utter futility of capital punishment. If the State cannot carry out a duly entered sentence of execution within 9½ years, then I seriously question the right of the State to carry out the sentence at all. More over, holding a man under sentence of death for almost ten years amounts to de facto, if not de jure, cruel and inhuman punishment.

EXHIBIT A

Executive Department

State of California

PAGE TWO

It is well recognized and widely accepted by every judge, lawyer, law enforcement official and penologist to whom I have ever talked, that if a criminal sanction is really to be effective, justice must be swift and certain. Justice delayed is justice thwarted. This case has now been allowed to drag on through court after court for year after year. No one is to blame, yet all of us concerned with the administration of justice are responsible.

I believe we have now reached a point where this matter must be brought to an end once and for all. So long as this can be done in such a way as to adequately protect society and properly fulfill the ends of justice, I have no hesitancy in taking action.

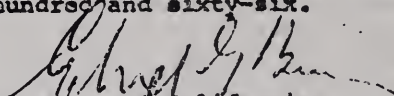
Since Mr. Bates has previously been convicted of felonies, it was necessary to obtain the written recommendation of the majority of the Justices of the Supreme Court of the State of California. I have now received this written recommendation.

The seriousness of Mr. Bates' crime and his subsequent conduct conclusively demonstrate to me that he should probably never again be released from prison. On the other hand, it now is within my power to impose upon him a sentence of life without possibility of parole.

In view of all of the foregoing facts, I have concluded that the interests of justice would best be served in this case by granting to Bates a limited commutation of his present death penalty sentence to one of life without possibility of parole.

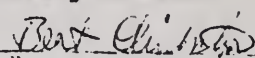
NOW, THEREFORE, I, Edmund G. Brown, Governor of the State of California, pursuant to the authority vested in me by the Constitution and statutes of the State of California, do hereby grant to Clyde Bates, Prison No. A-43143, a commutation of sentence from death to life imprisonment without possibility of parole.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this twenty-second day of December, A.D. nineteen hundred and sixty-six.


Governor of California


ATTEST


Secretary of State

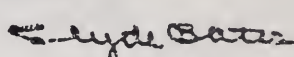
by 
Deputy Secretary of State

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THIS IS A CERTIFIED
COPY OF THE ORIGINAL FILE



I have read this
order.



1-6-67



EXHIBIT B

Executive Department

State of California

COMMUTATION OF SENTENCE

MANUEL JOE CHAVEZ

11431144

Manuel Joe Chavez was convicted of the crime of murder in the first degree, 6 counts, on August 16, 1957, by the Los Angeles County Superior Court. On August 22, 1957, he was sentenced to be executed for these crimes in accordance with applicable law. A codefendant, Clyde Bates, received a similar sentence.

Pursuant to the mandate of Article VII of the California Constitution, I have carefully reviewed this case.

Mr. Chavez was received on Condemned Row in San Quentin State Prison on August 29, 1957. Approximately a year later, on September 19, 1958, the convictions of Mr. Chavez and his codefendant Bates were affirmed by the California Supreme Court.

Since that date, Mr. Chavez has had three separate execution dates. He was first scheduled to be executed on January 16, 1959, but this execution was stayed by a Justice of the California Supreme Court. Chavez was next scheduled to be executed on August 14, 1959, but this execution was stayed by a federal judge. Chavez was next scheduled to be executed on February 27, 1963, but this execution was stayed by a federal judge to allow further legal proceedings. This last stay of execution was granted on February 26, 1963, the day before Chavez was to be executed. The case has remained pending in the courts since that date.

Almost four years ago I reviewed this case, and I announced at that time that I would not intervene. However, I have now concluded that the execution of Mr. Chavez would no longer be in the best interests of justice.

By virtue of the senseless and stupid act of Mr. Chavez and his codefendant of throwing gasoline into a crowded bar and then igniting it, six persons lost their lives, and two more were seriously injured. There is no question in my mind of the guilt of Mr. Chavez. He was intoxicated at the time, which may explain his senseless crime, but certainly does not justify it.

But I can no longer ignore the fact that Mr. Chavez has now been confined on Condemned Row in San Quentin State Prison for a period in excess of 9½ years. During this time, he has faced imminent execution on three separate occasions, but each time a court has intervened. The case of Mr. Chavez is a living example of what I believe to be the utter futility of capital punishment. If the State cannot carry out a duly entered sentence of execution within 9½ years, then I seriously question the right of the State to carry out the sentence at all. Moreover, holding a man under sentence of death for almost ten years amounts to de facto, if not de jure, cruel and inhuman punishment.

EXHIBIT B

Executive Department

State of California

PAGE TWO

It is well recognized and widely accepted by every judge, lawyer, law enforcement official and penologist to whom I have ever talked, that if a criminal sanction is really to be effective, justice must be swift and certain. Justice delayed is justice thwarted. This case has now been allowed to drag on through court after court for year after year. No one is to blame; yet all of us concerned with the administration of justice are responsible.

I believe we have now reached a point where this matter must be brought to an end once and for all. So long as this can be done in such a way as to adequately protect society and properly fulfill the ends of justice, I have no hesitancy in taking action.

The seriousness of Mr. Chavez' crime and his subsequent conduct conclusively demonstrate to me that he should probably never again be released from prison. On the other hand, it now lies within my power to impose on him a sentence of life imprisonment. Such a sentence will adequately protect society, and also will serve as a just punishment for his crime.

In view of all of the foregoing facts, I have concluded that the interests of justice would best be served in this case by granting to Chavez a limited commutation of his present death penalty sentence to one of life imprisonment.

NOW, THEREFORE, I, Edmund G. Brown, Governor of the State of California, pursuant to the authority vested in me by the Constitution and statutes of the State of California, do hereby grant to Manuel Joe Chavez, Prison No. A-43144, a commutation of sentence from death to life imprisonment.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this twenty-second day of December, A.D. nineteen hundred and sixty-six.

Edmund G. Brown
Governor of California

ATTEST

William G. Jordan
Secretary of State

by *Paul J. O'Connell*
Deputy Secretary of State

Printed in California Office of State Printing

Manuel Joe Chavez
I have read this document.
1-4-67

THIS IS A CERTIFIED

Edmund G. Brown

